Supreme Court, U.S.
FILED
05-153 JUL 26 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CITY OF FAIRFIELD, OHIO ET AL. PETITIONERS

v.

LYNN D. TUCKER, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR ~~A WRIT OF~~ CERTIORARI

John H. Clemmons
Thomas A. Dierling
Millikin & Fitton
530 Wessel Drive
Suite 2A
Fairfield, OH 45014
(513) 829-6700

Dennis P. Derrick
Counsel of Record
Seven Winthrop Street
Essex, MA 01929
(978) 768-6610

Wilson G. Weisenfelder
Laura I. Hillerich
Rendigs, Fry, Kiely & Dennis, LLP
900 Fourth & Vine Tower
Cincinnati, OH 45202
(513) 381-9200

Attorneys for the Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. Where an ordinance prohibiting "structures" in public right-of-ways is content-neutral and promotes substantial government interests which are achieved less effectively absent the regulation, can the court of appeals nevertheless find that it is not narrowly tailored under *Ward v. Rock Against Racism*, 491 U.S. 781(1989) because the expressive conduct it prohibits is in the public right-of-way for only a short period of time and "can be easily removed?"

2. Has the court of appeals made more rigorous than constitutionally required *Ward's* time, place or manner analysis for determining whether a content-neutral ordinance is narrowly tailored when it decided for itself that the Union's expressive activity in the public right-of-way did not present "any adverse effects" for motorists or pedestrians, did not diminish the aesthetics of this public forum, was merely "temporary" and could be "easily removed?"

3. Does *Ward's* narrow tailoring analysis allow a reviewing court to excuse the Union's violation of a content-neutral ordinance furthering substantial government interests because that court could imagine circumstances under which the Union's expressive conduct in the public right-of-way might not derogate from the legitimate government concerns which caused the City to enact the ordinance in the first place?

PARTIES TO THE PROCEEDING

CITY OF FAIRFIELD, Ohio; KEVIN HADDIX, in his Individual Capacity; JANETTE MATALA, In her individual capacity City of Fairfield Zoning Inspector; JOHN DOES(S) 2-5, in their individual capacities, PETITIONERS

LYNN D. TUCKER, JR., General Vice President, International Association of Machinists and Aerospace Workers; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 34, RESPONDENTS

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

CITATIONS OF OPINIONS AND ORDERS 1

BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT 15

The Decision Below Dramatically Misapplies This Court's Time, Place Or Manner Analysis For Determining Whether The City's Ordinance Is Narrowly Tailored To Promote Substantial Government Interests. 15

CONCLUSION 28

APPENDIX

Circuit Court Opinion (02/11/05) 1a

District Court Findings of Fact, Conclusions of Law, and Order (10/27/03) 24a

Circuit Court Order Denying Rehearing (04/28/05) 39a

Ordinance No. 155-03 ..... 40a

TABLE OF AUTHORITIES

Cases

ADDERLEY V. FLORIDA, 385 U.S. 39, 47-48 (1966) 16

BARTNICKI V. VOPPER, 532 U.S. 514, 545(2001) 17

BOOS V. BARRY, 485 U.S. 312, 318(1988) 17

CAMERON V. JOHNSON, 390 U.S. 611 (1968). 16

CAREY V. BROWN, 447 U.S. 455, 460-462(1980) 16, 17

CLARK V. COMMUNITY FOR CREATIVE NON-VIOLENCE, 468 U.S. 288, 293(1984) 18, 21, 25, 26

CORNELIUS V. NAACP LEGAL DEFENSE & ED. FUND, 473 U.S. 788, 799-800(1985) 16

COX V. LOUISIANA, 379 U.S. 559, 563(1965) 16

EDWARDS V. SOUTH CAROLINA, 372 U.S. 229, 235(1963) 16

FRISBY V. SCHULTZ, 487 U.S. 474, 480-481(1988) 17, 22

GRAFF V. CITY CHICAGO, 9 F.3D 1309(7TH CIR. 1993) 9

HAGUE V. CIO, 307 U.S. 496, 515(1939) 17

HEFFRON V. INTERNATIONAL SOC. FOR KRISHNA CONSCIOUSNESS, INC., 452 U.S. 640, 649(1981) 18, 25, 26

HILL V. COLORADO, 530 U.S. 703, 722 & N.30(2000) 16

LUBAVITCH CHABAD HOUSE, INC. V. CITY OF CHICAGO, 917 F.2D 341(7TH CIR. 1990) 8

LYNN D. TUCKER, JR. ET AL. v. CITY OF FAIRFIELD, OHIO ET AL., 398 F.3D 457(C.A NO. 03-4508)..... 1

MADSEN v. WOMEN'S HEALTH CTR., INC., 512 U.S. 753, 763(1994) 18, 19

MEMBERS OF CITY COUNCIL v. TAXPAYERS FOR VINCENT, 466 U.S. 789, 803 & N. 22(1984)..... 15, 18

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES ET AL. v. TAXPAYERS FOR VINCENT ET AL., 466 U.S. 789(1984).....8, 18, 22

METROMEDIA, INC. v. CITY OF SAN DIEGO, 453 U.S. 490, 507 (1981) 19

PERRY EDUC. ASS'N v. PERRY LOCAL EDUCATORS' ASS'N, 460 U.S. 37, 45(1983) 10, 17

SCHNEIDER v. STATE, 308 U.S. 147, 160(1939)..... 19

THORNHILL v. ALABAMA, 310 U.S. 88, 101-103(1940) 16

UNITED STATES v. ALBERTINI, 472 U.S. 675, 689(1985)..... 21

UNITED STATES v. GRACE, 461 U.S. 171, 176-177(1983) 16, 17

WARD v. ROCK AGAINST RACISM, 491 U.S. 781, 799(1989) ..... PASSIM

WATCHTOWER BIBLE & TRACT SOC. OF N.Y., INC. v. VILLAGE OF STRATTON, 536 U.S. 150, 175 (2002)..... 17

Statutes

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1331..... 3

28 U.S.C. Section 1343(a)(4) 3

28 U.S.C. Section 2101(c) 2

29 U.S.C. Section 157 7

42 U.S.C. Section 1983 ..... 3, 7

Rules

Revised Supreme Court Rule 13.3 2

CITATIONS OF OPINIONS AND ORDERS.

The published opinion of the Court of Appeals for the Sixth Circuit in *Lynn D. Tucker, Jr. et al. v. City of Fairfield, Ohio et al.*, 398 F.3d 457(C.A. No. 03-4508), decided and filed February 11, 2005, affirming the District Court's order granting the Respondents a preliminary injunction, is set forth in the Appendix hereto(App. 1-23).

The unpublished Memorandum and Order of the United States District Court for the Southern District of Ohio, Western Division, in *Lynn D. Tucker, Jr. et al. v. City of Fairfield, Ohio et al.*(Civil Action No. C-1-03-607), dated October 27, 2003, granting the Respondents' motion for a preliminary injunction, is set forth in the Appendix hereto(App. 24-38).

The unpublished order of the Court of Appeals for the Sixth Circuit in *Lynn D. Tucker, Jr. et al. v. City of Fairfield, Ohio et al.*, C.A. No. 03-4508, filed April 28, 2005, denying the Petitioners' timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 39).

The full text of the City's Ordinance No. 155-03, amending Section 905.03(c) of the Fairfield City Code, dated September 13, 2003, is set forth in the Appendix hereto(App . 40-45).

BASIS FOR JURISDICTION IN THIS COURT.

The decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's granting of the Respondents' motion for a preliminary

injunction was entered on February 11, 2005; and its order denying the Petitioners' timely filed petition for rehearing *en banc* was filed on April 28, 2005(App.1;39).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the Petitioners' timely filed petition for rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law...abridging the freedom of speech.

United States Constitution, Amendment XIV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law....

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. Section 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE.

The Respondent Lynn D. Tucker, Jr. ("Tucker") is the General Vice President of the International

Association of Machinists and Aerospace Workers, Eastern Regional Office; and the Respondent International Association of Machinists and Aerospace Workers, Lodge No. 34 ("the Union") is a duly organized labor group located in Cincinnati, Ohio(App. 25).

On three separate days, February 26, 2003, July 1, 2003, and July 31, 2003, Tucker and several of the Union's members picketed within the public right-of-way adjacent to Fairfield Ford, a car dealership located at 5221 Dixie Highway within the municipal limits of the Petitioner City of Fairfield, Ohio("the City")(App. 2;25-26). There were 25 to 40 protesters at each demonstration which all took place in the public right-of-way between Dixie Highway and Fairfield Ford. Each of these demonstrations lasted between one and two hours.

While protesting Fairfield Ford's alleged unfair labor practice of refusing to negotiate with the Union, on each occasion the Union members carried picket signs and deployed in the public right-of-way an inflatable rat balloon measuring approximately twelve (12) feet high and eight (8) feet wide. The rat balloon was placed on a tarp, inflated using a generator and internal fan and then secured to the ground with tent stakes or tethers so that it would not tip over. The rat balloon remained in a stationary location, staked in the right-of-way, during the course of each of the Union's demonstrations in front of Fairfield Ford.

Once the demonstration concluded, Union members turn off the generator, disconnect the fan, deflate the balloon, pull the tethers out of the ground and then remove the rat balloon from the public right-of-way. Each procedure for deploying and later removing the rat

balloon in the public right-of-way takes between five to ten minutes.

At the time of these Union demonstrations in front of Fairfield Ford, the City had in force its Ordinance 905.03 of the Fairfield City Code which governs the use of public streets, alleys and grounds. Subsection (c) of this Ordinance provided:

> No person, firm, or corporation shall construct or place or cause the construction or placement of any shrubbery, trees, parking facilities *or any other structure* or improvement, other than approved street trees and mailboxes, on any street, alley, public right or [sic] way, easement or public grounds without the written permission of the [City's] Public Works Director.

(App. 27)(emphasis supplied). As originally enacted, Ordinance 905.03 defined a "structure" as

> anything constructed, the use of which requires permanent location on the ground or attachment to something having permanent location on the ground, and also includes anything constructed which is not enclosed within another structure and is placed in a stationary location.

(App. 27).

The Union notified the City's Police Department about its demonstration on February 26, 2003, and its intention to use the rat balloon. Although the City's police officers arrived at the demonstration after Fairfield Ford complained about the activity in front of its business, they